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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CALVIN J. WEBER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

CALVIN J. WEBER, pro se
4620 Charter Dr.
Arnold, MO 63010-4204
314-464-2541

52 pp

STATEMENT OF QUESTIONS

In the appeal of revocation of petitioner's security clearance, did Merit Systems Protection Board make the right decision by denying petitioner a hearing and allowing the agency to revoke petitioner's security for no other reason than "whistleblowing," when the revocation was then used as the only reason to remove petitioner from Federal service, at which time the Board granted a hearing but refused to look at the underlying reason (whistleblowing) citing the Supreme Court's ruling in Dept of Navy v. Egan, 484 U.S. 518 (1988) ?

Did the Board pre-empt the Purpose of the Whistleblower Protection Act of 1989 which mandates that whistleblowers be protected ?

Did the Board abridge petitioner's Constitutional Right to Due Process of Law?

REFERENCE TO OFFICIAL OPINIONS DELIVERED BY U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND THE MERIT SYSTEMS PROTECTION BOARD (MSPB)

U.S. Court of Appeals for the Federal Circuit Judgment, on appeal from MSPB in cases SL-1221-93-022-W-1 and SL-1221-92-0398-B-1, dated May 13, 1994

MSPB (Full Board) Opinion and Order, SL-1221-93-0022-W-1 and SL-1221-92-0398-B-1 dated Oct 25, 1993

MSPB (Regional Board) Initial Decision, SL-1221-92-0398-B-1, dated April 27, 1993

MSPB (Full Board) Opinion and Order, SL-1221-92-0398-W-1, dated March 16, 1993

MSPB (Regional Board) Initial Decision, SL-1221-93-0022-W-1, dated February 16, 1993

MSPB (Regional Board) Initial Decision, SL-1221-92-0398-W-1, dated October 13, 1992

DATE OF ENTRY OF JUDGMENT

This Petition for a Writ of Certiorari requests a review of the Judgment entered on May 13, 1994 by the U.S. Court of Appeals for the Federal Circuit which affirmed MSPB (Full Board's) Opinion and Order dated Oct 25, 1993, which affirmed the Initial Decision to deny petitioner a hearing on the revocation of petitioner's security clearance for whistleblowing.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION

The statutory provision in the Intent of Whistleblower Protection Act of 1989 is believed to confer on the Supreme Court jurisdiction to review the decree in question. Also, jurisdiction is believed to be conferred by the fact that the Chief Executive Officer encourages Federal employees to blow the whistle on waste and mismanagement, which is exactly what petitioner did, and no rules or laws were violated. And finally, abuse of the Supreme Court's decision in Egan, which left the Executive Branch of Government free to revoke clearances without any established criteria, is believed to be a reason to confer jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner was denied the Constitutional right to due process of law.

CONCISE STATEMENT CONCERNING FACTS

The concise statement of facts is that

petitioner's security clearance was revoked for the singular reason of whistleblowing. The Board ruled that revoking a security clearance is not a personnel action, therefore petitioner was denied a hearing. Petitioner was then removed from Federal service (after 19 years of service) for the singular reason of revoked clearance. Petitioner was branded a "security risk" because of disclosures, which were not specifically prohibited by law nor specifically required by Executive Order to be kept secret.

Petitioner was provided a hearing for appeal of the removal, but was deprived any discussion regarding underlying reason for the discharge because of the Supreme Court's ruling in Egan. Even if a hearing were granted in the appeal of security clearance revocation, it would amount to a "flouting" of due process of law, because the Board would also bar any discussion regarding the underlying reason.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the Court of Appeals for the Federal Circuit is that CSRA of 1978 grants a judicial review of the Board's decision.

DIRECT AND CONCISE ARGUMENT

The only argument for amplifying the reasons for allowing this petition is that of concerns of Executive abuse of power, as stated by the dissenting former Justices (White, Brennen and Marshall) in the Egan case, is alive and well. The revoking of petitioner's security clearance was without a doubt used as a tool for removal because an earlier effort in 1990 to remove petitioner "for cause" failed because of the OSC's intervention. Then the managers checked with various law enforcement agencies, looking for a record on petitioner which could be used to revoke petitioner's clearance (evidence of that activity was obtained under FOIPA). When no record was found then "whistleblowing" was used.

Managers then claimed "loss of clearance" as a "cause" and the Board agreed. This amounts to Government running amok.

OSC as well as the Board claims they are absolutely barred from looking at the underlying reasons, which can result in abuse of discretion. Regulations state that a clearance can be revoked because of "poor judgment." This leaves the field wide open for managers to rid federal employees for most any reason, including personal dislike of the individual.

In the interest of justice, petitioner thinks the Supreme Court should re-examine the Egan principles in light of this petition.

For background information, the reason given by the agency for revoking petitioner's clearance was false and unsustained charges (as determined by Dept of Justice) that petitioner disclosed classified information during Desert Shield Campaign. Earlier whistleblowing matters involved disclosure of contracting waste of $25 MIL (DoDIG find).

Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-3096

CALVIN J. WEBER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S) SL1221930022-W-1 and SL 1221920398-B-1. This CAUSE having being heard and considered it is ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36.

Per Curiam (NEWMAN, MICHEL, and RADER, Circuit Judges).

DATED: MAY 13, 1994

ENTERED BY ORDER OF THE COURT

S/ Francis X. Gindhart, Clerk

Issued as a mandate: June 3, 1994

Filed May 13, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CALVIN J. WEBER Appellant v. DEPARTMENT OF THE ARMY Agency	)	DOCKET NUMBERS SL-1221-93-0022-W-1 SL-1221-92-0398-B-1 DATE: OCT 25, 1993

Calvin J. Weber, Arnold, Missouri, pro se

Abby K. Horwitz, Esquire, St. Louis, MO
for the agency

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on February 16, 1993, that dismissed his individual right of action (IRA) appeals for lack of jurisdiction. We JOIN these appeals for adjudication pursuant to 5 C.F.R. § 1201.36(a)(2), and 1201.116(a)(5), and, for the reasons discussed below, we find that

the petitions do not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We, therefore, DENY them. We REOPEN these cases on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decisions as MODIFIED by this Opinion and Order, and DISMISS the appeals.

BACKGROUND

On August 3, 1992, the appellant filed an appeal with the Board's St. Louis Regional Office, alleging that the agency improperly proposed to revoke his security clearance.[1] In his appeal, the appellant indicated that, on July 30, 1992, he had sought corrective action from the Office of the Special Counsel with respect to the agency's action.

In two separate orders, the administrative judge acknowledged the

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[1] This appeal was docketed as appeal number SL1221920398W1.

appellant's filing and informed him that a question existed regarding the Board's jurisdiction over the appealed matter. The administrative judge informed the appellant that, though he sought corrective action from the Special Counsel, the Board might not have jurisdiction over the appeal at that time because he did not indicate that the Special Counsel had notified him that it was terminating it's investigation or that 120 days had elapsed since he sought corrective action. The administrative judge further explained that the action at issue was not otherwise appealable to the Board. The administrative judge, therefore, provided the appellant with two opportunities to submit evidence and argument establishing Board jurisdiction. Appeal File (SL1221920398W1), Tabs 2, 4.

Following submissions by both parties on the jurisdiction issue, the administrative judge dismissed the appeal, finding as follows: (1) The Board lacked

jurisdiction over the appellant's IRA appeal because 120 days had not passed since he sought corrective action from the Special Counsel and the appellant did not submit any evidence that the Special Counsel had notified him that it terminated its investigation of his allegations; and (2) the Board also lacked jurisdiction over the appeal under 5 C.F.R. Part 1201 because the subject matter, suspension of an employee's access to classified information, was not an appealable action. In dismissing the appeal, the administrative judge also informed the appellant that he could refile his IRA appeal after the Special Counsel notified him that it was terminating its investigation, or 120 days had elapsed from the time he sought corrective action from the Special Counsel.

The appellant petitioned for review, asserting that, on August 18, 1992, the Special Counsel informed him that it lacked "jurisdiction for lack of evidence of

prohibited personnel practices." In Weber v. Department of the Army, 56 M.S.P.R. 605, 607-08 (1993), the Board found that although the letter from the Special Counsel did not provide a basis for granting a review, the record established that the appellant first pursued the matter with the Special Counsel and 120 days elapsed. the Board, therefore, remanded the appeal to the regional office for adjudication. In doing so, the Board noted that, to the extent that a jurisdictional question existed regarding whether the action complained of was a "personnel action" under 5 U.S.C. § 2302(a)(2)(A), the administrative judge should provide the appellant with notice of the showing required to establish jurisdiction and an opportunity to submit such evidence and argument. Id. at 608.

After providing the appellant with an opportunity to submit evidence and argument regarding jurisdiction on remand,[2] the administrative judge issued an initial

decision, in the appeal docketed as SL-1221-92-0398-B-1, that again dismissed the appeal on jurisdictional grounds, finding as follows: (1) Had Congress intended to include the revocation or intent to revoke a security clearance to be a personnel action under § 2302(a)(2)(A), it would have expressly stated so; (2) based upon the Board's reasoning in Caddell v. Department of Justice, 52 M.S.P.R. 529, 532-33 (1992), the action at issue is not included in § 2302(a)(2)(A)(iii), which covers "an action under Chapter 75 of this title or other disciplinary or corrective action"; (3) because the appellant was not subjected to a "personnel action," there was no need to determine whether the appellant's disclosures constituted whistleblowing; and (4) because the appellant did not raise a non-frivolous

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2 On remand appeal number SL1221920398W1 was redesignated SL-1221-92-0398-B-1.

allegation of jurisdiction, he was not entitled to the hearing he sought.

On October 17, 1992, the appellant filed another individual right of action (IRA) appeal, docketed as appeal number SL 1221-93-0022-W-1, alleging that the agency was improperly proposing to revoke his security clearance in reprisal for his whistleblowing activities. The administrative judge informed the appellant that a question existed regarding the Board's jurisdiction over this matter. Appeal File (SL-1221-93-0022-W-1), Tab 3.

Following both the parties' submissions, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the agency's proposal to revoke the appellant's security clearance was not a "personnel action" for the following reasons: (1) A proposal to revoke a security clearance is not specifically listed in the statute; (2) the proposed action is not a decision concerning pay,

benefits, or awards as described in § 2302(a)(2)(A)(ix); (3) a security clearance revocation is not a matter involving a change in duties or responsibilities that is inconsistent with the employee's salary or grade level, as defined in § 2302(a)(2)(A)(x); and (4) the process for deciding whether to revoke a security clearance is analogous to a fitness-for-duty examination, which the Board has held is not a personnel action.

In his petition for review in appeal number SL-1221-93-0022-W-1, the appellant asserts that revocation of his security clearance should be considered as disciplinary or corrective action under § 2302(a)(A)(iii), which states that a "personnel action" includes "an action under chapter 75 of this title or other disciplinary or corrective action." The appellant further asserts that the administrative judge ignored Congressional intent in enacting the Whistleblower

Protection Act (WPA). In addition, he states that new evidence exists because the agency has now proposed to remove him from his position.[3]

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[3] In his petition for review in appeal SL-1221-92-0398-B-1, the appellant asserts that the agency's action is a personnel action under § 2302(a)(2)(A)(iii) because it is "other corrective or disciplinary action." The appellant asserts that he did not have the opportunity to respond to the reasons cited by the agency in suspending his access to classified information, and that Congress envisioned actions such as the one at issue here to be "personnel actions" within the meaning of the Whistleblower Protection Act. The appellant's petition fails to provide a basis for granting review. The proposal to revoke a security clearance is not a "personnel action" under any of the subsections of § 2302(a)(2)(A), including subsection (iii), for the reasons discussed in this Opinion and Order. Further, because the revocation of a security clearance is not a "personnel action," the appellant's claim about the agency's procedures in revoking his security clearance is also outside of our purview. See Cowan v. Department of Agriculture, 13 M.S.P.R. 196, 198 (1982) (Board lacks jurisdiction to adjudicate a claim of harmful error absent an otherwise appealable matter), aff'd, 710 F.2d 1288, 1290 (Fed Cir. 1985).

ANALYSIS

As the administrative judge correctly found, the process for deciding whether to revoke a security clearance is analogous to a fitness-for-duty examination because both procedures are used to determine whether an employee meets the qualifications for his or her position. Initial Decision at 3. As the administrative judge found, the Board held in Caddell, 52 M.S.P.R. at 532-33, that a fitness-for-duty examination is not a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)(iii). The Board found that a fitness-for-duty examination is not included within the statutory provision because it is not similar in nature to other Chapter 75 type actions. Id. This same reasoning applies to the revocation of a security clearance.

As the administrative judge also correctly found, in an IRA appeal, the appellant must show that he was subjected to a "personnel action," in addition to

showing that he engaged in whistleblowing. See 5 C.F.R. § 1209.2(b), 1209.4. Thus, the appellant's assertions, that the agency's intention to revoke his security clearance was based on improper retaliation for whistleblowing, and that Congress intended for whistleblowers like him to be covered under the WPA, lacks merit because the dismissal of his appeal was based upon the absence of a showing that the security clearance revocation was a "personnel action." Further, the appellant's statement that the agency has proposed his removal is not accompanied by any substantiating evidence, and is, in any event, immaterial to the outcome of this appeal. See Russo v. Veterns Administration, 3 M.S.P.R. 345, 349 (1980). [2]

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[2] In reaching our conclusion in this case, we have not considered the reply to the agency response to his petition for review because it was submitted after the record closed, and the appellant has not established that it is based upon new and material evidence that was not previously available despite his due diligence. See 5 C.F.R. § 1201.114(i).

ORDER

This is the Board's final order in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeals if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /S/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION and ORDER was sent today:

By certified mail to:

Calvin J. Weber
4620 Charter Drive
Arnold, MO 63010

By regular mail to:

Abby K. Horwitz, Esq.
Department of the Army
HQ, U.S. Army Aviation & Troop Command
Attn: AMSAT-C-JGA
4300 Goodfellow Boulevard
St. Louis, MO 63120-1798

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
St. Louis Regional Office
911 Washington Avenue, Suite 410
St. Louis, MO 63010-1203

By hand carry to:

Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Oct 25, 1993
Washington, D.C.

s/ Robert E. Taylor
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

CALVIN J. WEBER Appellant	)	DOCKET NUMBER SL-1221-92-0398-B-1
v.	)	
DEPARTMENT OF THE ARMY Agency	)	DATE: April 27, 1993

Calvin J. Weber, Arnold, Missouri, pro se.

Abby K. Horwitz, Esquire, St. Louis, MO for the agency.

BEFORE

Jack E. Salyer
Administrative Judge

INITIAL DECISION

Introduction and background

The appellant sought to file an Individual Right of Action (IRA) appeal with the Merit Systems Protection Board (the Board) under 5 U.S.C. § 1214(a)(3) and 1221(a) and 5 C.F.R. § 1209 from the agency's actions: (1) suspending his access to classified information on

March 26, 1990, and (2) intending to revoke his security clearance on July 7, 1992.[1] The appellant also sought to file an appeal with the Board under 5 U.S.C. § 7701(a) and 5 C.F.R. § 1201 concerning the matter. I subsequently dismissed the appellant's claims as not being within the Board's jurisdiction. Weber v. Department of the Army, Docket No. SL1221920398W1, slip op. (Initial Decision, Oct. 13, 1992).

In the Board's decision concerning the appellant's petition for review (PFR) of my initial decision, the Board vacated that portion of the initial decision which pertained to the IRA appeal, affirmed the remainder of the initial decision, and remanded the IRA appeal for further adjudication. The Board specifically found that, during the processing of the

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[1] The instant appeal should not be confused with several other IRA appeals and one stay request filed by the appellant which are currently pending in this office.

appellant's PFR, the IRA had become ripe for adjudication because the appellant had exhausted his remedies before the Office of Special Counsel (OSC). See Weber v. Department of the Army, MSPB Docket No. SL1221920398W1, slip op. at 4 (Mar 16, 1993) The appellant has failed to demonstrate that his appeal is within the Board's jurisdiction.

In its March 16, 1993, decision, the Board expressly stated that, upon remand, there might be an additional jurisdictional impediment to the appellant's IRA appeal, i.e., whether the actions complained of were "personnel actions" under 5 U.S.C. § 2302(a)(2)(A). See Weber, MSPB Docket No. SL1221920398W1, slip op. at 4-5. Accordingly, on March 18, 1993, I issued an order which provided both parties an opportunity to submit evidence and argument concerning the foregoing jurisdictional issues. Remand File, Tab 2.

Before the Board may address the merits

of an appellant's claim of reprisal for whistleblowing, the appellant must first demonstrate that the Board has jurisdiction over the agency's action. See e.g., Caddell v. Department of Justice, 52 M.S.P.R. 529, 533 (1992). There are three requirements that must be met before the Board may exercise jurisdiction over an IRA appeal. See 5 U.S.C. § 1214(a)(3) and 1221(a); 5 C.F.R. § 1209.2(b)(1). First, an individual must have sought and exhausted OSC review where the allegedly retaliatory personnel action is not independently appealable to the Board. See 5 U.S.C. § 1214(a)(3). Second, the individual must have been subjected to a "personnel action" that was threatened, proposed, taken, or not taken subsequent to the whistleblowing. See 5 U.S.C. 1221(a); 5 C.F.R. § 1209.2(b)(1). Third, the individual claiming reprisal must have engaged in whistleblowing. See 5 U.S.C. § 2302(b)(8).

In the instant IRA appeal, the Board found that the appellant had exhausted his remedies before OSC. See Weber, MSPB Docket No. SL1221920398W1, slip op. at 4. Therefore, I need not address that issue in this decision. However, concerning the jurisdictional requirement stated above, I find that, in the instant appeal, the appellant has not shown that he was subjected to one of the numerous personnel actions listed at 5 U.S.C. § 2302(a)(2)(A). I find that neither an agency's suspension of access to classified information nor its intent to revoke a security clearance is one of the personnel actions specifically listed under the foregoing statutory provision. In this vein, I find it likely that, had Congress intended that the suspension of access to classified information or the intent to revoke a security clearance be personnel actions under 5 U.S.C. § 2302(a)(2)(A), it would have expressly so stated.

The appellant nonetheless claims that the suspension of his access to classified information and intent to revoke his security clearance are personnel actions under the language of 5 U.S.C. § 2302(a)(2)(iii), i.e., that each is "an action under chapter 75 of this title or other disciplinary or corrective action." For the following reasons, I find that the appellant's claims are without merit. I find that although a suspension of access to classified information or the intent to revoke a security clearance could conceivably lead to a chapter 75 action or "other disciplinary or corrective action," such actions themselves are simply not in the nature of disciplinary or corrective actions under 5 U.S.C. § 2302(a)(2)(A)(iii).

In addition, in Caddell, 52 M.S.P.R. at 532-33, the Board expressly held that, under the ejusdem generis rule of statutory construction,[2] the "other' disciplinary or corrective action referred to under

5 U.S.C. § 2302(a)(2)(A)(iii) must be in the nature of a Chapter 75 action. In Caddell, the Board further found that because the actions covered under Chapter 75, as listed at 5 U.S.C. 7512, did not include a fitness-for-duty examination, the latter action was not a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii). Based on analogous reasoning, I find that the suspension of access to classified information and the intent to revoke a security clearance are likewise not personnel actions under 5 U.S.C. § 2302(a)(2)(A)(iii) because they are not in the nature of Chapter 75 actions. See also Caddell, 52 M.S.P.R. at 533 n.4; Marren v.

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2 This "rule of statutory construction provides that where general words follow specific words in an enumeration, the general words are construed to describe only objects similar in nature to those objects enumerated by the specific words." See Caddell, 52 M.S.P.R. at 532-33; Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084, 1092 (6 th Cir 1981), citing 2A Sutherland, Statutory Construction (4 th ed. C. Sands 1973), Sec. 47-17

Department of Justice, 50 M.S.P.R. 474, 475 (1991).

Accordingly, I find that appellant has failed to show that either the suspension of his access to classified information or the intent to revoke his security clearance is a personnel action under 5 U.S.C. § 2302(a)(2)(A) over which the Board has jurisdiction.[3] Therefore, I conclude that the appellant has failed to demonstrate that the Board has jurisdiction over his IRA appeal. See 5 U.S.C. § 1214(a)(3) and 1221(a); 5 C.F.R. § 1209.2(b)(1).

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3 Because of the foregoing finding, I need not address the remaining jurisdictional issue, i.e., whether the appellant was a whistleblower. For the same reason, I may not review the merits of the appellant's IRA appeal. Finally, because the appellant has not raised a non-frivolous allegation of jurisdiction, he is not entitled to the hearing he requested. See Manning v. Merit Systems Protection Board, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984); Rose v. Department of Health and Human Servics, 721 F.2d 355, 356 (Fed. Cir. 1983).

DECISION

the appellant's request for corrective action is DISMISSED.

FOR THE BOARD: S/ Jack E. Salyer
Administrative Judge

NOTICE TO THE APPELLANT

This initial decision will become final on June 1, 1993, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or Federal Court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

Your petition must be postmarked or hand-delivered no latter than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I hereby certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Calvin J. Weber
4620 Charter Drive
Arnold, MO 63010

Agency's Representative

Abby K. Horwitz
Department of the Army
U.S. Army Aviation and Troop Command
Attn: AMSAT-C-JGA
4300 Goodfellow Boulevard
St. Louis, MO 63120-1798

Other

Marjorie Marks
U.S. Office of Personnel Managemment
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

April 27, 1993

S/ Pamela Ann Bryant
Legal Technician

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CALVIN J. WEBER Appellant	)	DOCKET NUMBER SL1221920398W1
v.	)	
DEPARTMENT OF THE ARMY Agency	)	DATE: March 16, 1993

Calvin J. Weber, Arnold, Missouri, pro se.

Abby K. Horwitz, Esquire, St. Louis, MO for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued Oct 13, 1992, that dismissed his appeal. For reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1207.117, VACATE the initial decision to the extent

it pertains to appellant's individual-right-of-action (IRA) appeal, AFFIRM the remainder of the initial decision, and REMAND the appellant's appeal for further review.

BACKGROUND

On August 3, 1992, the appellant filed an appeal with the Board's St. Louis Regional Office, alleging that the agency improperly proposed to revoke his security clearance. In this appeal, the appellant indicated that, on July 30, 1992, he had sought corrective action from the Office of the Special Counsel with respect to the agency's action.

In two separate orders, the administrative judge acknowledged the appellant's filing and informed him that a question existed regarding the Board's jurisdiction over the appealed matter. The administrative judge informed the appellant that, because he sought corrective action from the Special Counsel,

the Board may not have jurisdiction over the appeal at that time because he did not indicate that the Special Counsel had notified him that it was terminating its investigation or that 120 days had elapsed since he sought corrective action. The administrative judge further explained that the action at issue in the appeal is a matter that is not otherwise appealable to the Board. The administrative judge, therefore, provided the appellant with two opportunities to submit and argument establishing Board jurisdiction.

Following submissions by both parties on the jurisdictional issue, the administrative judge dismissed the appeal, finding as follows: (1) The Board lacks jurisdiction over the appellant's IRA appeal because 120 days had not passed since he sought corrective action from the Special Counsel and the appellant did not submit any evidence that the Special Counsel had notified him that it terminated

its investigation of his allegations; and (2) the Board also lacks jurisdiction over the appeal under 5 C.F.R. § Part 1201 because the subject matter, suspension of an employee's access to classified information, is not an appellable action. In dismissing the appeal, the administrative judge also informed the appellant that he could refile his IRA appeal after the Special Counsel notified him that it was terminating its investigation, or 120 days had elapsed from the time he sought corrective action from the Special Counsel.

In his petition for review, the appellant asserts that on August 18, 1992, the Special Counsel informed him that it lacked "jurisdiction for lack of evidence of prohibited practices."*

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* We find that the appellant's petition for review was timely filed because the appellant has established that he placed it in the Postal Service mail stream before the filing deadline. See Raphel v. Department of the Army, 50 M.S.P.R. 614, 618 (1991).

ANALYSIS

The appellant's petition appears to assert that on August 18, 1992, the Special Counsel notified him that it was terminating its investigation of his request for corrective action. We note, however, that the appellant has not submitted a copy of the Special Counsel's letter. The appellant's claim in this regard does not provide a basis for granting review because the letter was in existence prior to the close of the record below, and the appellant has not explained why he was unable to present this evidence or argument before the record closed despite the exercise of due diligence. Appeal File, Tabs 2-4. See 5 C.F.R. § 1201.115; Banks v. Department of the Air Force, 4 M.S.P.R. 268, 271 (1980); Avansino v. U.S. Postal Service, 3 M.S.P.R. 211, 214 (1980).

The Board may now properly assert jurisdiction over this appeal, however,

because the record shows that the appellant first pursued this matter with the Office of Special Counsel and 120 days have now elapsed. Appeal File, Tab 1. See 5 C.F.R. § 1209.5(a)(2). Rather than require the appellant to file a new IRA appeal, we will remand this appeal to the regional office as an administrative convenience. Cf. Ward v. Department of the Navy, 22 M.S.P.R. 441, 443 (1984) (appeal involving allegation of discrimination properly before the Board where 120 days had elapsed since the filing of a formal complaint of discrimination).

ORDER

Accordingly, we REMAND this case to the St. Louis Regional Office for further adjudication consistent with this Opinion and Order. To the extent that a question exists on remand as to whether the action complained of is a "personnel action" under 5 U.S.C. § 2302(a)(2)(A), or as to any other possible jurisdictional impediment,

the administrative judge should provide the parties with notice of the showing necessary to establish jurisdiction and an opportunity to submit such evidence and argument, before taking any further action that is appropriate.

FOR THE BOARD: S/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION and ORDER was sent today:

By certified mail to:

Calvin J. Weber
4620 Charter Drive
Arnold, MO 63010

By regular mail to:

Abby K. Horwitz, Esq.
Department of the Army
HQ, U.S. Army Aviation & Troop Command
Attn: AMSAT-C-JGA
4300 Goodfellow Boulevard
St. Louis, MO 63120-1798

Marjorie Marks
Office of Personnel Management
Employees Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
St. Louis Regional Offiec
911 Washington Avenue, Suite 410
St. Louis, MO 63101-1203

By hand to:

Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Oct 25, 1993 S/ Robert E. Taylor
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

CALVIN J. WEBER Appellant v. DEPARTMENT OF THE ARMY Agency	DOCKET NUMBER SL-1221-93-0022-W-1 DATE: February 16, 1993

Calvin J. Weber, Arnold, Missouri, pro se.

Abby K. Horwitz, Esquire, St. Louis, MO for the agency.

BEFORE

William H. Rima III
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 17, 1992, Calvin J. Weber, a GS-12 General Engineer with the U.S. Army Aviation and Troop Command, timely filed an individual right of action appeal from the agency's proposal to revoke his security clearance. This appeal was filed after

appellant received notice from the Office of Special Counsel on August 19, 1992, that it had terminated its inquiry. As explained below, appellant's request for corrective action is DISMISSED for lack of jurisdiction.

JURISDICTION

Appellant claims that the letter proposing to revoke his security clearance was issued in reprisal for his whistleblowing activity. That proposal letter listed the charges against appellant and offered him an opportunity to respond with evidence and argument on his behalf before the agency decided whether to revoke his security clearance. See enclosure to appellant's appeal, tab 1 of the agency file. Before the Board can address the merits of appellant's claim of reprisal, appellant must first show by preponderant evidence that the Board has jurisdiction over the agency's proposal. See, e.g.,

Caddell v. Department of Justice, 52 M.S.P.R. 529, 533 (1992).

There are three requirements that must be met before the Board can exercise jurisdiction over an IRA appeal. See 5 U.S.C. § 1214(a)(3) and 1221(a); 5 C.F.R. § 1209.2(b)(1). First, the individual must have been subjected to a "personnel action" that was threatened, proposed, taken, or not taken subsequent to the whistleblowing. See 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.2(b)(1). Second, the individual claiming reprisal must have engaged in whistleblowing. See 5 U.S.C. § 2302(b)(8). And, third, the individual must have sought and exhausted OSC review where the alleged retaliatory personnel action is not independently appealable to the Board. See 5 U.S.C. § 1214(a)(3).

In the instant appeal, appellant has not shown that he was subjected to a "personnel action" as defined at 5 U.S.C. 2302(a)(2). Pursuant to this statutory

definition of a "personnel action," there is a list of specific actions. An agency's proposal to revoke a security clearance, or the actual revocation of a security clearance for that matter, is not specifically listed.

In addition to the specific actions listed, the statutory definition of "personnel action" refers to agency decisions concerning an employee's pay, benefits, or awards concerning education or training; and any other significant change in duties or responsibilities that are inconsistent with the employee's salary or grade level. See 5 U.S.C. § 2302(a)(2)(A)(ix) and (x). It would appear that a proposal to revoke a security clearance, or even the revocation of a security clearance, is not a matter concerning an employee's pay, benefits, or awards. A security clearance revocation is also not a matter involving a change in duties, even though a security clearance

revocation could lead to that.

For example, an employee may be demoted from a position requiring a security clearance to a position where no security clearance is required. But the revocation of a security clearance is not a "personnel action" by itself. In the foregoing example, the demotion would be the "personnel action," and the security clearance revocation would merely be the basis for the demotion.

Moreover, it would appear that the process for deciding whether to revoke a security clearance is analogous to a fitness-for-duty examination. Both procedures are used to determine whether an employee meets the qualification of his or her position. The Board has held that an order to undergo a fitness-for-duty examination is not a personnel action. See Caddell v. Department of Justice, 52 M.S.P.R. at 532-33.

Accordingly, I find that appellant has

failed to show that a proposal to revoke his security clearance is a "personnel action" over which the Board has jurisdiction.[1] I therefore cannot address the merits of appellant's claim of reprisal.

DECISION

Appellant's request for corrective action is DISMISSED.

FOR THE BOARD: S/ William H. Rima III
Administrative Judge

1 The agency also argued that the Board lacks jurisdiction because this is a matter involving a security clearance. Although the Board's jurisdiction is severly limited in security clearance matters, the Board still has some jurisdiction in certain circumstances, as limited as it may be. See Department of Navy v. Egan, 484 U.S. 518 (1988).

NOTICE TO APPELLANT

This initial decision will become final on March 23, 1992, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request a Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial

decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Ave., NW., Room 806
Washington, DC 20419

Your petition must be postmarked or hand delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Calvin J. Weber
4620 Charter Dr.
Arnold, MO 63010

Agency's Representative

Ms. Abby K. Horwitz
Department of the Army
HQ, U.S. Army Aviation & Troop Command
Attn: AMSAT-C-JGA
4300 Goodfellow Boulevard
St. Louis, MO 63120-1798

Other

Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, NW., Room 7412
Washington, DC 20415

February 16, 1993 S/ Jo Ann Baumstark
Administrative Officer

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

CALVIN J. WEBER Appellant	)	DOCKET NUMBER SL1221920398W1
v.	)	
DEPARTMENT OF THE ARMY Agency	)	DATE: October 13, 1992

Calvin J. Weber, Arnold, Missouri, pro se.

Abby K. Horwitz, Esquire, St. Louis, MO for the agency.

BEFORE

Jack E. Salyer
Administrative Judge

INITIAL DECISION

The appellant seeks to file an Individual Right of Action (IRA) appeal with the Merit Systems Protection Board (Board) under 5 U.S.C. § 1214(a)(3) and 1221(a) and 5 C.F.R. Part 1209 from the action of the Department of the Army suspending his access to classified information on March 26, 1990. The appellant also seeks to file

an appeal with the Board under 5 C.F.R. Part 1201 concerning this matter. Appeal File, Tabs 1 and 3.

For the reasons outlined below, I DISMISS the appellant's IRA appeal as not presently within the Board's appellate jurisdiction. I also DISMISS the appellant's appeal under 5 C.F.R. Part 1201 because it does not involve an otherwise appelable action.

ANALYSIS AND FINDINGS

The appellant bears the burden of establishing that the action appealed is a matter within the appellate jurisdiction of the Board. 5 C.F.R. § 1201.56(a)(2)(i). The appellant was twice provided opportunities to address the jurisdictional issues in the appeal. Appeal File, Tabs 2, 4. The agency has moved to dismiss the appeal for lack of appellate jurisdiction. Appeal File, Tab 5.

An appellant may file an IRA appeal

after: (1) the Office of Special Counsel (OSC) has notified him that it is terminating its investigation concerening his allegations or (2) 120 days have passed since he sought corrective action from OSC. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.5.

The appellant concedes that he first sought corrective action concerning the suspension of his access to classified information on July 30, 1992, substantially less than 120 days ago. In addition, the appellant has submitted no evidence that it has terminated its investigation concerning his allegations. Appeal File, Tabs 1, 3. Accordingly, I find that the appellant's IRA appeal is not presently within the Board's appellate jurisdiction and GRANT the agency's motion to dismiss. See Weber v. Department of the Army, 47 M.S.P.R. 130,

135 (1991).[1]

Alternatively, the appellant seeks to file an appeal under 5 C.F.R. Part 1201. concerning the agency's suspension of his access to classified information. For the following reasons, I find that the appellant has failed to demonstrate that the suspension of access to classified information is a matter which is appellable to the Board under any law, rule, or regulation, i.e., an otherwise appellable matter. 5 U.S.C. § 7701(a).

The Board is charged with the adjudication of such matters as are placed within its jurisdiction under any law, rule, or regulation. 5 U.S.C. § 7701(a); see also Cowan v. Department of Agriculture, 13 M.S.P.R. 196, 198 (1982), aff'd sub nom

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1 The appellant may refile the instant appeal after: (1) OSC has notified him it is terminating its investigation concerning his allegations or (2) 120 days have passed since he sought corrective action from OSC.

Cowan v. United States, 710 F.2d 803, 805 (1983). In general, the types of matters which are appelable to the Board under law, rule, or regulation, i.e., otherwise appealable matters, are set out in the Board's regulations at 5 C.F.R. § 1201.3.

Here, I find that the appellant has not identified, and I am not independently aware of, any law, rule, or regulation which allows an appeal to be brought to the Board concerning an agency's action in suspending an employee's access to classified information. An adverse action based on a suspension of access to classified infromation or the denial of a security clearance would, of course, be appealable under 5 U.S.C. § 7513(d) and 7701(a). However, absent appealable adverse actions, appeals concerning underlying agency actions in restricting access to classified information and/or denying security clearances are matters which are not within the appellate

jurisdiction of the Board. See generally Department of the Navy v. Egan, 484 U.S. 518 (1988).

Accordingly, I find that the appellant has failed to demonstrate that the agency's action in suspending his access to information is an otherwise appelable matter. 5 C.F.R. § 1201.56(a)(2)(i).[2] Therefore, I find that the appellant may not appeal the matter to the Board under 5 C.F.R. Part 1201 either.[3]

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2 The appellant nowhere contends that the agency has taken an appelable adverse action against him based on the suspension of his access to classified information.

3 Based on the foregoing jurisdictional findings, the appellant is not entitled to the hearing which he requested. See Rose v. Department of Health and Human Services, 721 F.2d 355, 356 (Fed Cir. 1983). For the same reasons, I need not address the apparent lack of timeliness of the appellant's appeal under 5 C.F.R. Part 1201 from the March 26, 1990, suspension of access to classified information.

DECISION

The appeal is DISMISSED

FOR THE BOARD

S/ Jack E. Salyer
Administrative Judge

NOTICE TO THE APPELLANT

This initial decision will become final on November 17, 1992, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Mr. Calvin J. Weber
4620 Charter Dr.
Arnold, MO 63010

Agency's Representative

Ms. Abby K. Horwitz
U.S. Army AVSCOM
ATTN: AMSAV-JR
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St. Louis, MO 63120-1798

Other

Ms. Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, NW., Room 7412
Washington, DC 20415

October 13, 1992

S/ Pamela Ann Bryant
Legal Technician

SUPREME COURT, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

No. 94-374

In the Supreme Court of the United States

OCTOBER TERM, 1994

CALVIN J. WEBER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

FREDDI LIPSTEIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Merit Systems Protection Board has authority under the Whistleblower Protection Act of 1989, 5 U.S.C. 2302 (1988 & Supp. V 1993), to review an agency's notice of intent to revoke an employee's security clearance.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-374

CALVIN J. WEBER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1)[1] is unpublished, but is noted at 26 F.3d 140 (Table). The initial decision of the administrative law judge (ALJ) of the Merit Systems Protection Board (MSPB) in Docket No. SL1221920398W1 (Pet. App. 45-53) is unreported. The opinion and order of the MSPB remanding for another hearing (Pet. App. 27-34) is reported at 56 M.S.P.R. 605. The decision of the ALJ on remand (Pet. App. 15-26) is unreported. The initial decision of the ALJ of the MSPB

[1] To facilitate reference to the opinions below, we have numbered the pages of petitioner's appendices consecutively, beginning with the first unnumbered page following the argument section of the petition.

in Docket No. SL1221930022W1 (Pet. App. 35-44) is unreported. The opinion and order of the MSPB in the consolidated appeal of both decisions (Pet. App. 2-14) is reported at 59 M.S.P.R. 293.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1994. The petition for a writ of certiorari was filed on August 3, 1994. The petition invokes the Whistleblower Protection Act of 1989, 5 U.S.C. 2302 (1988 & Supp. V 1993), as the basis for this Court's jurisdiction. The proper basis for this Court's jurisdiction is 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed for several years as an electronics engineer by the United States Department of the Army and held a security clearance in connection with the performance of his job duties. On July 7, 1992, the Army sent petitioner a Letter of Intent to revoke his security clearance. See C.A. Supp. App. 24-27.[2] This action was based, in part, on a Federal Bureau of Investigation (FBI) report determining that petitioner had intentionally disclosed classified information to unauthorized persons, including representatives of the news media. *Id.* at 25-26. The FBI report noted that petitioner's disclosures occurred during Operation Desert Shield in the fall of 1990 and had "identified specific vulnerabilities of military aircraft, the estimated number of aircraft affected by these

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[2] "C.A. Supp. App." refers to the Supplemental Appendix filed in the court of appeals with the Brief for respondent MSPB.

vulnerabilities, and the deployment and location of these aircraft." A.F. Tab 1b, at 2.[3]

In accordance with 32 C.F.R. 154.56, the Letter of Intent set forth a detailed list of the factual bases for the revocation of petitioner's security clearance, advised petitioner that he had 60 days in which to explain or refute these allegations, and instructed petitioner how to obtain a copy of his investigative file. The letter also informed petitioner that his access to classified information was suspended until a final determination was made on the security clearance. C.A. Supp. App. 24-27.

Petitioner responded to the notice on September 8, 1992 (A.F. Tab 1d). On September 30, 1992, the Army's reviewing security officer affirmed his initial recommendation that petitioner's security clearance be revoked. He noted that petitioner's response had not addressed the "primary security concern," which was the "intentional release of classified information to unauthorized media representatives (as substantiated by the FBI)." A.F. Tab 4a. In the meantime, petitioner sought corrective action from the MSPB's Office of Special Counsel (OSC). Pet. App. 3. On August 19, 1992, the OSC notified petitioner that it had found no evidence of any prohibited personnel practices towards him on the part of the Army. *Id.* at 30.

2. Petitioner appealed to the MSPB. He alleged that the Army was proposing to revoke his clearance in retaliation for disclosures he had made concerning government waste and unsafe practices, in violation of

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[3] "A.F." refers to the Army's agency file on the case, which was submitted to the MSPB in connection with petitioner's first appeal, Docket No. SL1221930022W1. The documents within this file were tabbed but not sequentially numbered before the Board, and are identified herein by their tab number and letter.

the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 2302 (1988 & Supp. V 1993). Pet. App. 47. On April 27, 1993, following a remand for procedural reasons,[4] the MSPB's administrative law judge (ALJ) dismissed petitioner's appeal for lack of jurisdiction. The ALJ stated that the Army's Letter of Intent to revoke petitioner's security clearance did not constitute a "personnel action" under 5 U.S.C. 2302(a)(2)(A), and thus petitioner's claim was not cognizable under the statute. Pet. App. 22-23.[5] While this appeal was pending, petitioner filed a second appeal of the Army's action with the MSPB. On February 16, 1993, a second ALJ dismissed this appeal, also finding that a revocation of a security clearance did not constitute a specified "personnel action" subject to the WPA. Pet. App. 39-40.

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[4] Petitioner's appeal was initially dismissed for lack of jurisdiction under 5 U.S.C. 1214(a)(3) (Supp. V 1993), because petitioner failed to demonstrate that the OSC had terminated its investigation or that 120 days had elapsed since petitioner had sought corrective action from the OSC. The MSPB remanded petitioner's appeal for further adjudication since, by the time the MSPB considered petitioner's appeal from the dismissal, 120 days had elapsed. Pet. App. 31-32.

[5] The WPA identifies certain prohibited personnel practices and bars agencies from taking certain "personnel actions" against employees. Neither "personnel actions," as defined in Section 2302(a)(2)(A), nor "adverse actions," as defined in the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7501 *et seq.*, nor performance evaluations under the CSRA, 5 U.S.C. 4301 *et seq.*, which are included by reference, include the denial or revocation of a security clearance. Moreover, 5 U.S.C. 2302(b)(8) (Supp. V 1993) excludes from the coverage of the WPA unauthorized disclosures by employees of information required by Executive order to be protected in the interest of national defense or foreign affairs.

Petitioner petitioned the MSPB for review of the decisions of both ALJs. Pet. App. 2. The MSPB consolidated the two appeals. The MSPB then affirmed the ALJ decisions and ordered the appeals dismissed. It reasoned that a notice of intent to revoke a security clearance is analogous to an order to take a fitness-for-duty examination, which the MSPB has held not to constitute a "personnel action" under 5 U.S.C. 2302(a)(2)(A)(iii). Pet. App. 11. Because petitioner had not shown that he had been subjected to a personnel action, the MSPB did not consider his claim that his clearance had been withdrawn in retaliation for protected whistleblowing. *Id.* at 12.

3. On May 13, 1994, the Federal Circuit summarily affirmed the MSPB's decision. Pet. App. 1.

ARGUMENT

1. The MSPB correctly held that notification of intent to revoke a security clearance does not constitute a "personnel action" under the Whistleblower Protection Act of 1989 (WPA). Under 5 U.S.C. 1221 (Supp. V 1993), the MSPB has jurisdiction to hear appeals from employees seeking corrective action with respect to any "personnel action" either threatened or taken against them that constitutes a prohibited personnel practice. See 5 C.F.R. 1209.2(b)(1), 1209.4.[6] A "personnel action" is defined in 5 U.S.C. 2302(a)(2)(A) as:

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[6] Prohibited practices include, *inter alia*, discrimination on the basis of race, color, religion, sex, national origin, or handicapping condition, 5 U.S.C. 2302(b)(1), coercion on the basis of political activity, 5 U.S.C. 2302(b)(3), and reprisals against an employee for disclosing information reasonably believed to evidence violations of the law, gross mismanagement, gross waste of funds, or an abuse of authority, 5 U.S.C. 2302(b)(8) (Supp. V 1993).

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

Neither a denial nor a revocation of a security clearance is listed among these "personnel actions."

The MSPB (Pet. App. 20) and the court of appeals correctly rejected petitioner's claim that the proposed revocation of his security clearance constitutes "an action under chapter 75 of this title or other disciplinary or corrective action," under 5 U.S.C. 2302(a)(2)(A)(iii). Chapter 75 confers on the MSPB jurisdiction to review "adverse actions," a term limited to removals, suspensions for more than 14 days, reductions in grade or pay,

and furloughs of 30 days or less. 5 U.S.C. 7512, 7513(d). In *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988), this Court held that the denial or revocation of a security clearance is not an "adverse action," and thus is not subject to Board review. *A fortiori*, a proposal to revoke a security clearance also does not constitute an "adverse action."[7]

A proposed revocation of a security clearance also does not constitute "other disciplinary or corrective action" under 5 U.S.C. 2302(a)(2)(A)(iii). In rejecting this argument, the MSPB properly applied the principle that, where general words follow specific words in an enumeration, the general words are construed to describe only things similar in nature to those described by the specific words; an "other disciplinary or corrective action" must therefore be similar "in . . . nature" to an action under Chapter 75. Pet. App. 20-21 & n.2; see *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). A revocation of a security clearance, however, is fundamentally different from the personnel actions described in Chapter 75 (removals, suspensions, reductions in grade or pay, and furloughs). Unlike those actions, the revocation of access to classified information is not aimed at punishing an employee, but is a step designed to prevent unauthorized disclosures that could cause damage to national security. As this Court recognized in *Egan*, "the protection of classified information must be committed to the broad discretion of

---

[7] Petitioner appears to argue (Pet. 4) that *Egan* is inapposite because it did not involve whistleblowing. The "adverse action" concept, on which the *Egan* decision was based, derives from the same statutory section as is involved in this case, and nothing in *Egan* suggested that "adverse action" takes on different meanings depending on the factual context of the case.

the agency responsible, and this must include broad discretion to determine who may have access to it." 484 U.S. at 529. Access to classified information must be "clearly consistent with the interests of the national security." *Id.* at 528.

Moreover, even if revocation of a security clearance were to constitute a "personnel action" within the meaning of the WPA, petitioner's claim would still be unavailing. The WPA excludes from its protection disclosures that are "specifically prohibited by law" or that divulge information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. 2302(b)(8)(A) (Supp. V 1993). The revocation here was based on petitioner's having disclosed the specific vulnerabilities of military aircraft during Operation Desert Shield. His conduct therefore falls outside the protection of the whistle-blower statute. *Kent* v. *General Services Admin.*, 56 M.S.P.R. 536 (1993).

2. Petitioner also claims (Pet. 2) that the Army's proposed revocation of his security clearance abridged his constitutional due process rights. Contrary to petitioner's assertion (Pet. 5), agencies are not free to "rid [themselves of] federal employees for most any reason, including personal dislike of the individual." Rather, procedural safeguards, both within the agency and through the MSPB, provide employees with procedural due process for any adverse actions taken against them as the result of the loss of their security clearance. See *Egan*, 484 U.S. at 532-533; *id.* at 535 (White, J., dissenting). Petitioner pursued his MSPB remedy for removal from his job, and the Federal Circuit affirmed the Board's decision. See *Weber* v. *Department of the Army*, No. 94-3284 (Fed. Cir. Oct. 14, 1994).

Petitioner was also protected against arbitrary agency action with respect to the proposed revocation of his security clearance. The Army complied with its Personnel Security Program Regulations in issuing a Letter of Intent to revoke petitioner's security clearance and suspending his access to classified information. See 32 C.F.R. 154.56. Petitioner was provided a written statement of the reasons why the agency intended to revoke his security clearance, which detailed the factual basis for the proposed action. Petitioner was given 60 days in which to reply in writing to the allegations in the notice, and he availed himself of that opportunity. Since petitioner has no right to a security clearance, *Egan*, 484 U.S. at 528, these procedures were constitutionally adequate, *id.* at 533.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1994

No. 94-374

(3)

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CALVIN J. WEBER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

CALVIN J. WEBER
pro se Petitioner

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ARNOLD, MO 63010-4204
314-464-2541

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REPLY

1. Respondent misstated petitioner's "Question Presented." The correct questions presented are listed in the Petition for Writ of Certiorari. Petitioner's security clearance was revoked for whistleblowing, and the revoked clearance was used for petitioner's removal. There was no other reason involved in either action. Because respondent surfaces false and unsustained FBI accusations, petitioner will add that the protected disclosures were entirely lawful and did not violate any provision of any Executive Order. It is a matter of Government running amok.

2. Respondent has addressed merits of petitioners case obtained from information in the MSPB file. In reply to the FBI's accusations and MSPB/respondent's misleading and allegedly concealed (certainly omitted) information, petitioner invokes rights guaranteed by the Fifth Amendment's Due

Process to defend against false, fraudulent, fictitious, unsubstantiated, and unsustained accusations. Additionally, both the Army and FBI engaged in acts which violated U.S. criminal codes. The acts were flagrant and indefensible.

3. Petitioner was employed for 19 years as a Mechanical/Aerospace Engineer with the Army's Aviation and Troop Command (ATCOM). Plaintiff worked with high tech helicopter radar and infrared countermeasures (defensive equipment to thwart anti-aircraft missiles). Prior to Desert Shield (dating back to 1988), petitioner disclosed Army aviation war readiness problems and waste of taxpayers money by the Army's restricting contracts to sole source procurement in violation of the Competition in Contracting Act of 1984. There was a finding by the DoDIG that the Army had wasted $25 Million by not competing. ATCOM is located in St. Louis, MO.

4. The Army immediately sought reprisal and attempted to remove petitioner in May 1990, for cause. Petitioner sought and obtained an investigation by the OSC. Investigations by OSC and the head of the agency (Pentagon) occurred throughout 1990 and into 1991. The OSC investigation found prohibited personnel practices and saved petitioner's employment.

5. However, in October 1990, while OSC's investigation was ongoing, petitioner was arrested, searched for weapons and contraband, handcuffed, physically and verbally abused, and then forcibly ejected from the federal workplace by armed guards and military personnel. Petitioner was carried down the hallway in handcuffs parallel to the floor, in front of peers, and temporarily incarcerated. Petitioner did not resist arrest.

6. The incident stemmed from petitioner's speaking with the news media during Desert

Shield in the fall of 1990, when petitioner disclosed that Army mismanagement had put soldiers lives in harm's way. Petitioner lawfully exercised rights under the First Amendment's Freedom of Speech. The Army acknowledged that petitioner's disclosures were accurate. Action was taken to correct the readiness problem when Legislators got involved. However, petitioner alleges there were still casualties, including fatalities, from helicopter(s) shot down during Desert Storm because of Army mismanagement. Allegedly, a national news article, written by the military, revealed the loses and played down mismanagement. Then in an alleged violation of First Amendment rights, DOD issued a post Desert Storm directive which in essence stated that equipment problems and shortcomings experienced during the gulf war was classified information, i.e., a cover-up.

7. Misdemeanor charges against petitioner for failure to comply with an officer's

directive during petitioner's forced removal was subsequently dismissed by the U.S. Attorney. The agencies violated the law, not petitioner.

8. Petitioner's forced removal received national media attention and an unsolicited response from Rep. John Conyers, Jr., Chairman of the House Committee on Legislation and National Security Subcommittee of the Committee on Government Operations. Rep. Conyers stated that he was "greatly concerned" about the treatment of petitioner and asked that the Secretary of the Army prepare a briefing as to the status of petitioner. The briefing stated the matter was under investigation by the DoDIG. The investigation apparently was dropped. The FBI's accusations however, are contradictory to findings of the National Security Subcommittee as well as some Army documents which claimed petitioner disclosed "sensitive" information; which is not a level of National Security

classification. Executive Order 12356 prohibits creating other terms to identify classified information.[1]

9. Petitioner's forced removal from the workplace violated provisions of WPA 1989 provision which prohibits a personnel action during an OSC investigation unless approved by the MSPB. There was no approval; the forced removal was done at the whim of the military with the assistance of Federal Protective Service guards. Petitioner was forced to stay away from the workplace until petitioner's security clearance could be revoked and then termination of employment (2 1/2 years later).

10. Shortly before petitioner's physical removal in October 1990, the Army's Intelligence and Counterintelligence

1. Paragraph 1.1(b) states; "Except as otherwise provided by statute, no other terms shall be used to identified classified information."

agents rummaged through petitioner's background, dating back to when petitioner graduated from high school (1960), looking for a record (reason) to revoke petitioner's security clearance. Various local law enforcement agencies (including the FBI) were contacted to see if they had a record on petitioner. GSA Protective Services also ran a criminal history check through NCIC, LEADS, MULES, and REGIS (whoever they are). Except for traffic there was no record. These searches, eight (8) in total, were conducted without Probable Cause, in violation of the Fourth Amendment.

11. Following physical removal from the workplace, petitioner was forced on a work detail involving construction projects at a nearby Army base. The reason given by the agency (Army) for the detail was that it was "prejudicial to the interest of national security," thereby denying petitioner the right to appeal or seek a transfer to a job not requiring a security

clearance. The Army's reason was false, fictitious, and fraudulent; a criminal violation of 18 U.S.C. 1001. Petitioner was forced to work at a technician level during the gulf war and more than 2 years thereafter based on improper procedure a a willful criminal act. Because the actions taken against petitioner contained the word security, false as it was, MSPB still divested itself of jurisdiction.

12. While assigned to the work detail, both FBI and Army deliberately conspired to criminally prosecute petitioner on knowing false espionage related charges in retaliation for all of petitioner's whistleblowing activities. This was a case of malicious prosecution. Conspiracy was in violation of 18 U.S.C. 372.

13. During FBI's investigation, lasting approximately 1 1/2 years, there was not one interview with petitioner granted by the FBI. This violated petitioner's

rights under the Fifth Amendment to confront the accuser(s).

14. On February 3, 1992, the Department of Justice, Security Section, notified FBI that Justice declined to prosecute petitioner. This statement is the closing paragraph of the FBI report referred to in respondent's response (A.F. Tab 1b, at 2.).

15. On February 28, 1992, the "FBI report" was forwarded by a personal letter addressed to petitioner's supervisor; the same Army Colonel who had petitioner ejected from the workplace in Oct 1990. The FBI letter stated that "the enclosed document is provided for use in administrative/legal proceedings involving above captioned subject <petitioner>." This letter violated petitioner's rights under Amendment Five (Due Process) and (Double Jeopardy).

16. On March 16, 1992 formal Army action was taken to revoke petitioner's security clearance based on the FBI report. An

internal Army Pentagon memorandum stated that on April 3, 1992, Justice had notified the Army that Justice declined to prosecute petitioner. Both the FBI and Army were given the notice. There is no documentation showing where the Pentagon notified ATCOM of the Justice decision.

17. The Army's Personnel Department in a memorandum stated that petitioner's security clearance was revoked for one and only one reason. That reason was unauthorized disclosure of classified information of classified information during Desert Shield Campaign. Petitioner's security clearance was revoked on February 22, 1993, not September 30, 1992 as indicated in response.

18. Between the date of the Letter of Intent (July 7, 1992) and the revocation (February 22, 1993), petitioner responded five (5) times requesting proof of the charges made against petitioner. Contrary to respondent's statement that petitioner

did not address the primary security concern, petitioner most certainly did respond. One problem was that both the Army and FBI withheld files from petitioner in an effort to conceal facts. In the absence of files, petitioner asked questions for the accuser(s) to answer. The accusers refused to answer questions.

19. Respondent has allegedly concealed (certainly omitted) the fact that the same FBI accusations used to revoke petitioner's security clearance were first used by the FBI and Army in an unsuccessful attempt to prosecute petitioner on espionage related charges under 18 U.S.C. 798. The FBI report referenced by respondent is a two (2) page unsigned document written on FBI stationary. The report first lists references to newspaper articles, then states that petitioner's disclosures could not be traced to any classified documents, and concludes with the statement that Justice declined prosecution in this matter.

20. The FBI's determination that petitioner disclosed classified aircraft vulnerability information is a false, fraudulant, fictitious and unsustained determination. The matter involved disclosing information gathered from none other than open sources. According to the FBI's determination, the exterior view of a helicopter was SECRET information. Regarding the reference that FBI determined petitioner disclosed "location of these aircraft," petitioner only disclosed what was pictured in the newspapers and on TV. Saudia Arabia was the only location disclosed. Certainly nothing was classified about that location, the entire world knew about it. If pictures of helicopters were classified, then every newspaper, magazine, and TV newscast which showed deployed Army helicopters had disclosed classified information. The FBI's findings are flagrant, stupid, and indefensible and in violation of 5 U.S.C. 1001; but they worked.

21. Respondant also allegedly concealed (certainly omitted) the fact that FBI accused petitioner of violating an ATCOM in-house guidance statement which restricted what could or could not be discussed openly during an impending war. First, the guidance statement was not an Executive Order. Second, Executive Order 12356 prohibits the issuance of such a document for classification. Third, the guidance statement provided only guidance. Fourth, the guidance statement was provided to petitioner after-the-fact when sent to petitioner's residence by certified mail (Ex Post Facto). Fifth, the guidance statement could be used as a tool to abridge rights guaranteed by the First Amendment.

22. The Department of Justice made the decision not to PROSECUTE without contacting petitioner. Additionally, petitioner presumes Justice made the decision not knowing the charges were Ex Post Facto,

based on the fact the certified mail receipt is missing from the files; another act of concealment.

23. Regarding the "file" referenced in the Letter of Intent to Revoke petitioner's security clearance, petitioner made the request to obtain the file under FOI. However, information was withheld from petitioner. The Army file has large amounts highlighted in black, while the FBI has withheld their entire files from petitioner. Petitioner has made three (3) requests to the Army to obtain the withheld information and three (3) requests to the FBI to obtain the files. The Army has refused to respond while the FBI states that the files need to undergo declassification and that due to the large amount of requests, no guarantee could be provided as to when the FBI will act on petitioner's request. Petitioner does not even know details of reasons for security clearance revocation, a violation of petitioner's rights under Due Process.

The only information released by the FBI is that there are 2 files with a total of 168 pages. That was the extent of the FBI's release of information since petitioner's first FOI request made in September 1992.

24. Regarding respondant's statement that agencies are not free to rid themselves of federal employees for most any reason because of procedural safeguards, petitioner's case proves the statement wrong. Federal employees are continuously urged to make disclosures of waste, mismanagement and safety, which is exactly what petitioner did, and there are no procedural safeguards when it comes to revoking security clearances and then termination for loss of clearance. The MSPB hearing for petitioner's appeal of termination amounted to a flouting of due process, as due process was intended by the framers of the Constitution and provided to everyone else. Just being provided with

a piece of paper and a chance to respond is not due process of law.

25. After 6 years of whistleblower harassment, 1 OSC investigation which found the agency engaged in a prohibited personnel practice (600 pages of findings), 8 subsequent denials by OSC, 11 MSPB whistleblower appeals, 8 Petitions For Review with the Full MSPB, 9 Petitions For Review with the Court of Appeals for the Federal Circuit spanning 5 years of litigation, federal managers have found that Egan provided the tool for allowing arbitrary, capricious, and even criminal acts that were necessary to get rid of petitioner. There are no safeguards for bad faith and zealous actions.

26. If false, fictitious, fraudulent, and unsustained information used as gospel truth by MSPB weren't bad enough, the administrative judge allowed the agency to commit perjury during petitioner's

dismissal hearing. This was a similiar pattern with OSC who also allowed the agency to commit perjury. The OSC decided to overlook perjury instead of taking the matter before the Attorney General as a criminal act as is required by WPA of 1989.

27. During the hearing petitioner was not allowed to say anything other than did the agency provide a piece of paper and did the agency give petitioner a chance to respond. That is a meaningless exercise when there is bad faith, zealous actions, abuse and predispositions involved. Such an imbalance has stood due process on its head in petitioner's case. The dissenting Justices in Egan hit the nail on the head when they predicted occurances of false allegations, lack of rational nexus to national security concerns, and deprival of meaningful hearing.

28. Petitioner has researched and seen where a security clearance has been revoked

because of the person's driving record or financial irresponsibility. The Army's Personnel Security Program (AR 380-67) states in pertinent part that "The criteria for determining eligibility for a clearance ....shall include but not be limited to... Acts of omission or commission that indicate poor judgement, unreliability, or untrustworthiness." Such lose criteria leaves the field wide open for abuse.

29. The Kent v. GSA case referenced by respondent is irrevelant to petitioner's case. The charges in Kent are not false, fraudulent, fictitious and unsustained.

30. And lastly, respondent states that "The Army complied with regulation in issuing a Letter of Intent." Nothing is mentioned about "revocation." The facts are that procedures of AR 380-67 were not followed correctly, but then again there was no meaningful review provided to petitioner under CSRA.

CONCLUSION

Petitioner's disclosures were protected pursuant to 5 U.S.C. 2302(b)(8)(A)(ii). Petitioner's disclosures were lawful pursuant to 5 U.S.C. 2302(b)(8)(A). The Army and FBI acted in an arbitrary and capricious manner, and in contrary to law and violated U.S. criminal codes. The Army knowingly used Egan for protection. MSPB choose to parrot Army/FBI information stating that could go no further because of Egan. Then, MSPB and respondent have withheld information showing charges were unsustained. The principles of Egan and how they can be used for arbitrary, capricious and even criminal acts by an agency should be re-examined. Request that the Petition for Writ of Certiorari proceed and not be denied in light of the foregoing.

Respectfully submitted.

Calvin J. Weber
pro se petitioner

October 1994